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# The Immigration Crisis in American Courts: Children Representing Themselves

by WENDY MELISSA HERNANDEZ\*

## I. Introduction

As the 2020 United States presidential election swiftly approach, anti-migrant rhetoric and criminalization of asylum seekers has increased exponentially.<sup>1</sup> Although American courts have devised conflicting jurisprudence regarding the treatment of children,<sup>2</sup> the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) avoided an opportunity to clarify that the Due Process Clause of the Fourteenth Amendment, as applied to the federal government through the Fifth Amendment, requires indigent immigrant children (“IIC”) seeking refuge, to have legal representation during removal.<sup>3</sup> By analyzing the parallels between the unconstitutionality

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1. Jeff Faux, *Trump is Laying a Trap for Democrats on Immigration*, THE NATION (Apr. 2, 2019), <https://www.thenation.com/article/trump-immigration-democrats-2020-election/> (discussing why Trump’s insistence on a border wall is intended to make immigration a wedge issue in the 2020 United States presidential election); *see also supra* notes 3, 19, 22, 43, 44, 46, and 48 (discussing various ways in which the Trump administration has implemented punitive policies for asylum seekers).

2. *C.J.L.G. v. Sessions*, 880 F.3d 1122 (9th Cir. 2018) (holding that minor children do not have a right to legal counsel in immigration proceedings); *Cf.* Application of Gault, 387 U.S. 1 (1967) (holding that the requirements of the Due Process Clause of the 14th Amendment applies to juvenile defendants as well as adult defendants; these requirements include adequate notice of charges, notification of both the parents and *the child of the juvenile’s right to counsel*, opportunity for confrontation and cross-examination at the hearings, and *adequate safeguards against self-incrimination*) (emphasis added).

3. This Note will solely discuss the constitutional rights of migrant children, not those of migrant adults, although the latter is an area of law that should be addressed by legal scholars, especially given that this Note is written on the verge of what has been deemed the “largest work-

of sentencing juveniles to life without parole (“JLWOP”), and deporting IIC seeking asylum from cyclical persecution and poverty in their home country, this Note argues that failing to recognize IIC’s right to legal counsel<sup>4</sup> constitutes Cruel and Unusual Punishment, as prohibited by the Eighth Amendment of the United States Constitution.<sup>5</sup>

The United States’ commitment to the principle of “fairness” for all is conveyed in the Due Process provision of the Fifth Amendment.<sup>6</sup> Due Process requires that “[a]ll ‘persons’ within the United States, including [‘aliens[’]’]<sup>7</sup> . . . [have] freedom from imprisonment—from government custody, detention, or other forms of physical restraint.”<sup>8</sup> Undocumented persons are deprived of procedural due process protections during various

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raid of the decade,” and potentially hundreds of adults face removal without the appointment of legal counsel. Stella M. Chavez, Christopher Connelly & Anthony Cave, *ICE Arrests 280 Workers in Allen in Largest Workplace Immigration Raid in a Decade*, KERA NEWS (Apr. 3, 2019), [https://www.keranews.org/post/ice-arrests-280-workers-allen-largest-workplace-immigration-raid-decade?fbclid=IwAR2y-JDJrswT1uRiA9Vo7pTAm\\_MKx8ZpuxMSpgF-iUkD9zKThDzzKBoYd30](https://www.keranews.org/post/ice-arrests-280-workers-allen-largest-workplace-immigration-raid-decade?fbclid=IwAR2y-JDJrswT1uRiA9Vo7pTAm_MKx8ZpuxMSpgF-iUkD9zKThDzzKBoYd30).

4. Legal counsel, as discussed in this Note, refers to court-appointed legal counsel provided at the government’s expense, not legal counsel provided at the defendant’s expense. Generally, the Immigration and Nationality Act (“INA”) does not afford a right to counsel at the government’s expense in removal proceedings. 8 U.S.C. § 1534 (2001). However, the Supreme Court of the United States has discoursed that the Fifth Amendment’s guarantee of due process may require the appointment of counsel for individuals whom are incapable of representing themselves. *See Wade v. Mayo*, 334 U.S. 672, 683-84 (1948) (“There are some individuals who, by reason of age, ignorance, or mental capacity, are incapable of representing themselves in a prosecution of a relatively simple nature . . . [w]here such incapacity is present, the refusal to appoint counsel is a denial of due process of law.”). Consequently, this Note seeks to expand that right to children seeking asylum who are subject to immigration proceedings because they lack the mental capacity, due to their age and early development, to adequately advocate for their interests in a court of law. *See also Reno v. Flores*, 507 U.S. 292, 306 (1993) (addressing the detention and release of unaccompanied minors which gave rise to the *Flores Settlement Agreement* (FSA); the FSA set strict national regulations and standards regarding the treatment of minors by federal agencies; the FSA is supervised by Judge Dolly Gee of the United States District Court, Central District of California). At the time this Note is being written, the United States Department of Health and Human Services and the Department of Homeland Security under the Trump administration announced a final federal rule that effectively terminates the FSA, aforementioned. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *DHS and HHS Announce New Rule to Implement the Flores Settlement Agreement; Final Rule Published to Fulfill Obligations Under Flores Settlement Agreement* (Aug. 21, 2019, 10:00 AM), <https://www.dhs.gov/news/2019/08/21/dhs-and-hhs-announce-new-rule-implement-flores-settlement-agreement>.

5. U.S. CONST. amend. VIII.

6. U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property without due process.”).

7. For the purposes of this Note, but more importantly to humanize and dignify the people categorized as “aliens,” hereinafter, the Author will use the term “undocumented people” instead of the purported legalese.

8. *Hernandez v. Sessions*, 872 F.3d 976, 1003 (9th Cir. 2017) (discussing the suitability of due process rights for all persons in the United States); *see also* U.S. CONST. amend. V.

points in immigration proceedings. This Note will focus on undocumented IIC whom are in legal proceedings and seeking asylum; a group historically identified as possessing constitutional rights.<sup>9</sup> This Note will not address proceedings regarding children seeking admission *into* the United States, where constitutional rights are not recognized. Instead, this Note will discuss the *removal proceedings* that IIC experience in the United States,<sup>10</sup> and whom are afforded constitutional protection.<sup>11</sup>

The Ninth Circuit recently held in *C.J.L.G. v. Sessions* that the Due Process Clause does not create a categorical right to court-appointed counsel for undocumented children.<sup>12</sup> The court based its finding on the fact that the United States Supreme Court (“Supreme Court”) has “[never] determined that due process principles of fundamental fairness categorically require counsel in any context outside of criminal proceedings.”<sup>13</sup> Though IIC removal proceedings are civil proceedings and self-represented litigants are not uncommon in the civil context, removal proceedings intersect with criminal law, are complex to litigate, and have been deemed “crimmigration” by some scholars.<sup>14</sup> Despite the judiciary’s lack of clarification in *C.J.L.G.*

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9. *Reno v. Flores*, 507 U.S. 292, 306 (1993) (where Justice Scalia’s Majority Opinion stated, “[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings”). This Note will not discuss the Sixth Amendment of the U.S. Constitution, which grants the right to legal counsel for all people facing criminal charges, because immigration law is classified as civil law, not criminal law. However, the Author posits that despite its civil classification, immigration law is criminal in nature and should be classified accordingly, but that discussion is beyond the scope of this Note. Therefore, this Note will focus solely on the group of asylum-seeking children facing removal and their right to legal counsel as a procedural due process right.

10. The Author uses “removal” and “deportation” interchangeably to refer to the removability of undocumented people from the U.S., and his or her eligibility for relief under the INA.

11. Given the limitations of this Note, the Author is unable to include a legal analysis for immigrant children *seeking admission* to the U.S. However, the Author purports that those seeking admission at the border – especially if part of the current Honduran Caravans – should be granted constitutional rights and the right to court-appointed legal counsel.

12. *C.J.L.G. v. Sessions*, 880 F.3d 1122 (9th Cir. 2018) [(hereinafter “*C.J.L.G.*”)] (citing to *Gault* in terms that appointed counsel is limited “only [to] the problems [relating to] proceedings by which a determination is made as to whether a juvenile is a ‘delinquent’ as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution.” *Gault*, 387 U.S. 1 (1967)). In *C.J.L.G.*, the Ninth Circuit further distinguishes that in *Gault*, the court was preoccupied with the fact that non-represented juveniles face the possibility of being incarcerated in a state institution, which is akin to punishment for a criminal conviction. *Id.* at 36-37. *But cf. C.J.L.G. v. Sessions*, 880 F.3d 1122 (9th Cir. 2018), *reh’g en banc granted*, 904 F.3d 642 (9th Cir. 2018) (hereinafter “*C.J.L.G. II*”) (holding that since the petitioner will be represented by counsel in future administrative hearings, the *en banc* court need not address plaintiff’s contention that appointment of counsel for minors in removal proceedings is constitutionally required, leaving the question of whether IIC have a right to counsel unanswered).

13. *C.J.L.G.* (citing *Turner v. Rogers*, 564 U.S. 431 (2011)).

14. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (discussing the “import [of]

*v. Sessions*, it is well-established law that juveniles accused of crimes must be afforded the same due process rights as adults, including the right to counsel.<sup>15</sup> Further, the Supreme Court has held that sentencing juveniles to JLWOP is unconstitutional.<sup>16</sup>

As this Note is written, IIC who entered the United States as refugees from deadly threats, violent extortions, and persecution,<sup>17</sup> are navigating removal proceedings without counsel.<sup>18</sup> This Note has three objectives. First, it will explain why it is unconstitutional for children to “represent” themselves in federal immigration courts. Second, it will address the parallels between JLWOP and the deportation of IIC seeking refuge from violence and persecution. Lastly, it will argue that failing to recognize IIC’s right to legal counsel—specifically those facing removal—is a departure from settled constitutional law regarding due process rights and the prohibition of cruel and unusual punishment.

Part I of this Note provides historical background regarding migration pull factors for unaccompanied minors migrating to the United States via the southern border, debunks the alleged “crisis at the southern border,”<sup>19</sup> and analyzes inconsistencies in judicial treatment of children based on immigration status. Part II discusses the timeliness of the *C.J.L.G. v. Sessions* holding,<sup>20</sup> and the Judicial Branch’s missed opportunity to clarify that children facing removal are protected by the Due Process Clause. It also analyzes the necessity of due process protection for IIC, discusses the treatment of children in judicial proceedings, and highlights the danger of denying IIC due process. Part III contends that depriving IIC of safety from violence, qualifies as cruel and unusual punishment. Further, it posits that the unconstitutional removal of IIC’s without due process is unconstitutional because it subjects them to conditions in detainment that are equivalent to

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criminal justice norms into a domain built upon a theory of civil regulation” as well as the asymmetric incorporation of the criminal model into immigration law over the past twenty years); César Cuauhtémoc García Hernández, *Creating Immigration*, 2013 B.Y.U. L. REV. 1457, 1458 (discussing that immigration law enforcement has increasingly adopted the securitized approach of criminal law enforcement).

15. Application of Gault, 387 U.S. 1 (1967).

16. Miller v. Ala., 567 U.S. 460 (2012); see *infra* Part III.

17. *Migrant Caravan: What is It and Why Does It Matter?*, BBC NEWS (Nov. 28, 2018), <https://www.bbc.com/news/world-latin-america-45951782>.

18. Ahilan Arulanantham, *Immigrant Children Do Not Have the Right to an Attorney Unless They Can Pay, Rules Appeals Court*, ACLU (Feb. 6, 2018, 4:00 PM), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/immigrant-children-do-not-have-right-attorney>.

19. Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> (discussing Trump’s announcement of a national emergency to build a border wall and bypassing Congress in the process).

20. *C.J.L.G.*, 880 F.3d at 1122.

the cruel and unusual punishment of JLWOP sentences and outlawed solitary confinement practices in the juvenile and criminal contexts, respectively. At the time of this Note's publication, the 2020 United States presidential campaigns are in full swing, and because immigration discourse is used to sway voters, this Note aims to set the record straight about the immigration crisis: the immigration crisis does not stem from those seeking to gain entry into the United States, the crisis lies in the judiciary's disregard of IICs' constitutional rights in immigration proceedings.

## II. Current State of Immigration

As of 2019, it has been five years since President Barack Obama declared an "urgent humanitarian situation" at the United States southern border.<sup>21</sup> Despite the historically low number of migrant arrivals during the first year of his presidency, President Donald Trump has utilized social media to persuade the American public that there is a "crisis at the border," which amounts to a national emergency.<sup>22</sup> Contrary to Trump's declarations of a "crisis at the border," data produced by the United States Customs and Border Protection ("CBP") within his own administration, indicates that Trump's first year in office accounted for the lowest number of apprehended migrants since 1971.<sup>23</sup> Also, contrary to Trump's rhetoric, this Note will demonstrate that the true crisis is the denial of the right to legal counsel for IIC navigating a complex immigration system.

In order to understand what precipitated this violation of constitutional rights, it is imperative to address how U.S. intervention policies in Central America created push factors that led to the migration of unaccompanied Central American migrant children to the United States.<sup>24</sup> This section will provide historical background of the United States intervention in Central America, relate this history to the influx arrival of undocumented children at the United States southern border, examine the current state of the immigration caravan,<sup>25</sup> and discuss the inconsistent treatment of children in courts due to their legal status. This section's purpose is to frame the legal

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21. Katie Zezima & Ed O'Keefe, *Obama Calls Wave of Children Across U.S.-Mexico Border 'Urgent Humanitarian Situation,'* WASH. POST (June 2, 2014), [https://www.washingtonpost.com/politics/obama-calls-wave-of-children-across-us-mexican-border-urgent-humanitarian-situation/2014/06/02/4d29df5e-ea8f-11e3-93d2-ed4be1f5d9e\\_story.html?hpid=hp\\_hp-top-table-main-obama-waves%3Ahomepage%2Fstory&hpid=hp\\_hp-top-table-main-obama-waves%3Ahomepage%2Fstory](https://www.washingtonpost.com/politics/obama-calls-wave-of-children-across-us-mexican-border-urgent-humanitarian-situation/2014/06/02/4d29df5e-ea8f-11e3-93d2-ed4be1f5d9e_story.html?hpid=hp_hp-top-table-main-obama-waves%3Ahomepage%2Fstory&hpid=hp_hp-top-table-main-obama-waves%3Ahomepage%2Fstory).

22. Jon Sopel, *Trump National Emergency – A Major Land Grab by the President*, BBC NEWS (Feb. 15, 2019), <https://www.bbc.com/news/world-us-canada-47258780> ("Trump's first year in office saw the lowest number [of migrants] since 1971.").

23. Sopel, *supra* note 22.

24. "Push factors" are referred to as domestic factors that push people to migrate out of their home countries.

25. BBC NEWS, *supra* note 17.

argument without detracting from the primary legal issue: whether indigent immigrant children should be afforded the right to court-appointed counsel *at the government's expense*.

### A. Historical Background of United States Intervention in Central America

Central America's Northern Triangle, which consists of Guatemala, El Salvador, and Honduras, has emerged as one of the most violent regions in the world, where gangs control eighty-five percent of populations in Honduras and El Salvador.<sup>26</sup> Honduras consistently maintains the world's highest homicide rate for a nation that is not at war.<sup>27</sup> The United States has played a central role in spreading violence in the Northern Triangle.<sup>28</sup> When members of street gangs from California were deported to Honduras, Guatemala, and El Salvador, criminal organizations in Central America became increasingly violent, and weak—or corrupt—law enforcement failed to maintain order.<sup>29</sup> This was a direct result of the *racial caste* embedded in the United States' prison-industrial-complex, which contains, prosecutes, and deports youth of color, after incarcerating them in United States prisons overrun with gang politics.<sup>30</sup> For decades, the United States exercised its "international police power" by inserting itself into domestic matters<sup>31</sup> in Central American countries to undermine democracy and stability in the

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26. Alberto Arce & Michael Weissenstein, *UN Pushes for Illegals Coming Into U.S. to be Called Refugees*, MERCURY POST (July 8, 2014), [https://www.pottsmmerc.com/news/un-pushes-for-illegals-coming-into-us-to-be-called/article\\_92fb61cb-b9e6-563c-80b0-cbe53a93c920.html](https://www.pottsmmerc.com/news/un-pushes-for-illegals-coming-into-us-to-be-called/article_92fb61cb-b9e6-563c-80b0-cbe53a93c920.html) (discussing Central America's Northern Triangle as one of the most violent regions of the world).

27. *Id.*

28. *Id.*

29. This highlights the correlation of the formation of gangs in the U.S. with the deportation of groups that contribute to the violence in the Northern Triangle. However, the Author does not purport to criminalize gang members as the sole reason for this violence. It is beyond the scope of this Note, but critical to this discussion, to analyze the direct correlation of the systemic and racial oppression responsible for the formation of gangs and the history of marginalized youth seeking gangs as a protective measure. See José Miguel Cruz, *Central American Maras: From Youth Street Gangs to Transnational Protection Rackets*, 11 GLOBAL CRIME 382 (2010).

30. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 8 (The New Press, 2010) (discussing mass incarceration as a tool to further disenfranchise communities of color, and the use of a *racial caste* as the primary tool to achieve disenfranchisement). The Author utilizes this book as a foundation to further Alexander's argument in the context of the crimmigration practice of IIC removals.

31. Stephen Zunes, *The U.S. Role in the Honduras Coup and Subsequent Violence*, HUFFINGTON POST (June 19, 2016, 9:48 AM), [https://www.huffpost.com/entry/the-us-role-in-the-honduras-coup-and-subsequent-violence\\_b\\_5766c7ebe4b0092652d7a138](https://www.huffpost.com/entry/the-us-role-in-the-honduras-coup-and-subsequent-violence_b_5766c7ebe4b0092652d7a138) (discussing the U.S.'s intervention in the 2009 Honduran coup d'état).

region.<sup>32</sup> This is exemplified by the enactment of the Central America-Dominican Republic Free Trade Agreement (“CAFTA-DR”), which restructured the region’s economy, and ensured economic dependence on the United States.<sup>33</sup> Inevitably, these policies and practices led to the deterioration of social, political, and economic autonomy in Central America.<sup>34</sup>

## **B. Unaccompanied Children Arriving at the United States-Mexico Border**

After decades of brokenness in social, political, and economic systems in Central American countries, individuals began to migrate out of countries, such as Honduras, El Salvador, and Guatemala.<sup>35</sup> Understandably, the United States is a target destination for members of recent caravans.<sup>36</sup> However, migrants have also moved to or applied for asylum in Mexico.<sup>37</sup> Many of those migrating northward from Central America are women with children who are fleeing gender-based violence, gang violence, extortion, poverty, limited access to education, and poor social services.<sup>38</sup>

## **C. The Current State of Migrant Caravans**

On October 18, 2018, an estimated 3,000 migrants marched out of San Pedro Sula, Honduras.<sup>39</sup> By the end of November 2018, approximately 7,000 migrants had arrived at the United States-Mexico border.<sup>40</sup> The

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32. Mark Tseng-Puterman, *A Century of U.S. Intervention Created the Immigration Crisis*, MEDIUM WORLD (June 20, 2018), <https://medium.com/s/story/timeline-us-intervention-central-america-a9bea9ebc148> (discussing the impacts of a century of U.S. intervention in the Central American region).

33. 19 U.S.C. § 4101; Tseng-Puterman, *supra* note 32.

34. *Id.*

35. Aaron Terrazas, *Central American Immigrants in the United States*, MIGRATION POL’Y INST. (Jan. 10, 2011), <https://www.migrationpolicy.org/article/central-american-immigrants-united-states-0/> (In 2011, “[t]he U.S. was home to about 2.9 million immigrants from Central America.”).

36. *See infra* Part I, § C.

37. Sandra Cuffe, *Honduran Refugees Await Papers in Mexico as New Caravan Arrives*, ALJAZEERA NEWS (Jan. 17, 2019), <https://www.aljazeera.com/news/2019/01/hondurans-refugees-await-papers-mexico-caravan-arrives-190117222615064.html> (“[M]ore than 3,000 participants in the Central American exodus . . . presented themselves to immigration authorities upon entry into Mexico, received temporary legal status, and are now in the country’s refugee status consideration process.”).

38. UNICEF, *An Estimated 2,300 Children Traveling with Migrant Caravan in Mexico Need Protection and Essential Services*, UNICEF (Oct. 26, 2018), <https://www.unicef.org/press-releases/estimated-2300-children-traveling-migrant-caravan-mexico-need-protection-and>.

39. BBC NEWS, *Migrant Caravan: What is it and Why Does It Matter?*, BBC NEWS (Nov. 26, 2018), <https://www.bbc.com/news/world-latin-america-45951782>.

40. BBC NEWS, *supra* note 39.



caravan continued to grow despite Trump's zero tolerance<sup>41</sup> response,<sup>42</sup> and his deployment of 5,200 military troops<sup>43</sup> to the border.<sup>44</sup> As of January 15, 2019, an estimated 2,000 migrants in northern Honduras formed a caravan that was reportedly making its way to the United States-Mexico border.<sup>45</sup> On April 4, 2019, in an attempt to decrease the number of asylum-seeking refugees comprising these caravans, Trump threatened to "shut down" the southern border due to a national security concern.<sup>46</sup>

Although the exact number of migrants is unknown, the United States government, especially federal immigration courts, will face an enormous backlog of cases.<sup>47</sup> Additionally, the family separations that resulted from the Trump Administration's zero-tolerance policies<sup>48</sup> will inevitably lead to minor children engaging in court proceedings without their parents. These statistics are critical because immigration courts must find ways to

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41. Here, "zero tolerance" refers to a strict and uncompromising application of the law.

42. Olivia Solon, Julia Carrie Wong, Pamela Duncan, Margaret Katcher, Patrick Timmons & Sam Morris, *3,121 Desperate Journeys: Exposing a Week of Chaos Under Trump's Zero Tolerance*, THE GUARDIAN (Oct. 14, 2018), <https://www.theguardian.com/us-news/ng-interactive/2018/oct/14/donald-trump-zero-tolerance-policy-special-investigation-immigrant-journeys> ("On April 6, 2018, the U.S. Attorney General . . . direct[ed] federal prosecutors] to adopt immediately a zero-tolerance policy for violations of a federal law barring improper entry into the country.").

43. Camilo Montoya-Galvez, *U.S. Will Send 5,200 Troops to the U.S.-Mexico Border in Response to Caravans*, CBS NEWS (Oct. 29, 2018, 6:12 PM), <https://www.cbsnews.com/news/u-s-will-send-over-5200-troops-to-u-s-mexico-border-in-response-to-caravans/>.

44. Alan Gomez, *Central American Migrants Keep Heading Toward USA, Even as Trump Focuses on Stopping Caravans*, USA TODAY (Jan. 9, 2019, 5:19 PM), <https://www.usatoday.com/story/news/politics/2019/01/09/migrant-caravan-trump-crackdown-has-not-slowed-flow-families-us/2523034002/>.

45. Sarah Kinoshian, *'I Have to Try: New Migrant Caravan Leaves Honduras and Heads for the United States*, WASH. POST (Jan. 15, 2019), [https://www.washingtonpost.com/world/the\\_americas/i-have-to-try-new-migrant-caravan-leaves-honduras-and-heads-for-the-united-states/2019/01/15/db7240c8-183c-11e9-b8e6-567190c2fd08\\_story.html?](https://www.washingtonpost.com/world/the_americas/i-have-to-try-new-migrant-caravan-leaves-honduras-and-heads-for-the-united-states/2019/01/15/db7240c8-183c-11e9-b8e6-567190c2fd08_story.html?).

46. Nancy Cook & Andrew Restuccia, *Trump's Aides Warn Him Border Shutdown Would be Disastrous*, POLITICO (Apr. 2, 2019, 2:30 PM), <https://www.politico.com/story/2019/04/02/trump-aides-border-shutdown-disaster-1249828>.

47. TRAC IMMIGRATION, *Immigration Court Backlog Surpasses One Million Cases* (Nov. 6, 2018), <https://trac.syr.edu/immigration/reports/536/> (This data represents the increase in number of backlogged cases from fiscal year 2017-2018. Fiscal year 2019, was not accounted for in this report but is likely to increase.).

48. Olivia Solon, Julia Carrie Wong et al., *3,121 Desperate Journeys: Exposing a Week of Chaos Under Trump's Zero Tolerance*, THE GUARDIAN (Oct. 14, 2018), <https://www.theguardian.com/us-news/ng-interactive/2018/oct/14/donald-trump-zero-tolerance-policy-special-investigation-immigrant-journeys> ("On April 6, 2018, the U.S. Attorney General . . . direct[ed] federal prosecutors] to adopt immediately a zero-tolerance policy for violations of a federal law barring improper entry into the country.").

effectively manage the influx of cases.<sup>49</sup> Given the influx of cases, the crisis of indigent immigrant children facing removal from the United States without legal counsel will only be amplified. This must be remedied via the clarification of current jurisprudence or the passage of congressional legislation.

#### **D. Conflicting Jurisprudence Regarding Children Constitutes an Immigration Crisis**

Although courts intend to effectuate justice in a consistent, neutral manner, there are inconsistencies in how federal courts treat children.<sup>50</sup> An indigent person has the right to legal counsel.<sup>51</sup> However, current jurisprudence regarding children's legal rights varies significantly according to the charges against the child (civil or criminal), and the child's legal status.<sup>52</sup> A minor facing criminal charges has the same rights as an adult in a criminal trial, which includes the right to legal counsel at the government's expense.<sup>53</sup>

However, the Ninth Circuit—revered as the most progressive Circuit Court of Appeals<sup>54</sup>—recently held that a minor in an immigration proceeding does not have the right to legal counsel in immigration proceedings.<sup>55</sup> This is completely unreasonable. No child can, nor should be expected to, represent themselves in court. As such, this holding represents a departure from a child's constitutional right to legal counsel at the government's expense. Courts are not settled on this issue, especially since *C.J.L.G. v. Sessions* was reheard *en banc*, and the court did not address the issue of the

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49. This is based on the presumption that the caravanners are admitted into the U.S. But even without the presumption, the high number of backlogged cases provides insight into the dire need for efficient case management, which can be addressed through the appointment of legal counsel to children, among other services.

50. Immigration courts are not part of the Judicial Branch. Instead, they serve as an extension of the Executive Branch, but the Author purports that it does not serve justice to have this arrangement. Immigration judges are similarly-situated to judges in the Judicial Branch, yet face more restrictions in rendering decisions, which can, and do, result in inequity and unjust outcomes.

51. *Gideon v. Wainwright*, 372 U.S. 335, 338 (1963).

52. "Legal status" refers to whether the child is documented or undocumented. *May v. Daniels*, 359 Ark. 100, 108 (Ark. 2004) (held the term legal status is commonly used to classify an individual and identify the legal rights and duties for such a classification).

53. *Gault*, 387 U.S. at 1.

54. Dylan Mathews, *How the 9th Circuit Became Conservatives' Least Favorite Court*, VOX (Jan. 10, 2018) ("The circuit's appellate court, which covers California, Washington, Oregon, Arizona, Nevada, Idaho, Hawaii, Alaska, and Montana, has long been stereotyped as a liberal outlier, prone to left-wing rulings that are frequently reversed by the Supreme Court on appeal."), <https://www.vox.com/policy-and-politics/2018/1/10/16873718/ninth-circuit-court-appeals-liberal-conservative-trump-tweet>.

55. *C.J.L.G.*; see *infra* Part II: Due Process Protections are Necessary for Children in Immigration Court.

appointment of legal counsel.<sup>56</sup> Thus, the state of urgency—or more accurately, the “immigration crisis” identified by the past two administrations—is not at the southern border. Instead, it lies within the United States federal court system and, at the very least, calls for immediate federal legislation. In order for courts to administer justice, IIC must be afforded attorneys at the government’s expense as a basic necessity to provide equal justice before the law—especially due to the high stakes involved.<sup>57</sup>

### III. Due Process Protections are Necessary for Children in Immigration Court

The Fifth Amendment of the United States Constitution states that “[a]ll ‘persons’ within the United States, including [undocumented people] . . . [have] freedom from imprisonment—from government custody, detention, or other forms of physical restraint.”<sup>58</sup> Though in *Reno v. Flores* Justice Scalia, writing for the Majority, ruled that the Immigration Naturalization Service procedures did not violate juveniles’ procedural due process; he clarified that, “[i]t is well established that the Fifth Amendment entitles [undocumented people] to due process of law in deportation proceedings.”<sup>59</sup> It is also well-established that undocumented people have a statutory right to legal counsel, but *at their own expense*.<sup>60</sup> Further, federal circuit courts have rendered the right of representation to be “an integral part of the procedural right to which the [undocumented person] is entitled.”<sup>61</sup> Yet, *C.J.L.G. v. Sessions* left a lingering question unanswered: do indigent immigrant children have a categorical right to counsel at the government’s expense? This Note advances the claim that IIC *do* have a categorical right to legal counsel at the government’s expense.

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56. *C.J.L.G. II, reh’g en banc granted*, 904 F.3d 642 (9th Cir. 2018) (holding that since the petitioner will be represented by counsel in future administrative hearings, the *en banc* court need not address plaintiff’s contention that appointment of counsel for minors in removal proceedings is constitutionally required).

57. See *infra* Part III: Depriving Refugee Children Protection from Death Is Cruel & Unusual Punishment (a detailed discussion on the life-or-death stakes of indigent immigration children without legal counsel).

58. U.S. CONST. amend. V.

59. *Flores*, 507 U.S. at 292.

60. 8 U.S.C. § 1362 (1994) (emphasis added).

61. *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993) (internal quotation marks omitted).

### A. An Opportunity to Clarify Due Process Rights for Children

In *C.J.L.G. v. Sessions*,<sup>62</sup> the Ninth Circuit reheard arguments *en banc* from C.J.L.G.'s attorney ("CJ") and the Government. CJ's arguments for similarly-situated immigrant children's right to legal counsel were based on the general civil counsel doctrine presented in *Mathews v. Eldridge*<sup>63</sup> and *Turner v. Rodgers*,<sup>64</sup> as well as the standard treatment of children during court proceedings. Utilizing the aforementioned framework, this section will breakdown the *Mathews v. Eldridge* argument, discuss the ways in which children are treated in judicial proceedings, and take the analysis one step further by demonstrating: (1) why IIC are in danger without due process, and (2) why the high stakes involved in these cases warrant legal counsel at the government's expense.<sup>65</sup>

### B. The Balancing Test in *Mathews v. Eldridge*

In *Mathews v. Eldridge*, a landmark Due Process Clause case, the Supreme Court held that administrative agencies implicate due process rights when a party's property interest is at stake.<sup>66</sup> In *Mathews*, the Social Security Administration terminated Mr. Eldridge's Social Security benefits without providing him with a pre-termination hearing.<sup>67</sup> The Court held that a pre-termination hearing was not required, and established a balancing test for determining whether procedural due process has been correctly applied. This test considers: (1) the interest of a private party in the case, (2) the risk of erroneous deprivation and probable value of different procedures, and (3) the interest of another party or the Government in the case.<sup>68</sup> Here, applying the *Mathews v. Eldridge* test requires examining: first, an IIC's interest in seeking refuge in the United States; second, the risk of depriving the IIC of court-appointed counsel to navigate the highly-complex immigration court system; and, third, the government's interest in efficiently determining whether children qualify for asylum.

Here, the interest of the private parties, IICs, to seek refuge from violence, persecution, and death, is the determinative prong of the three-part test, because IIC have undoubtedly experienced high-risk trauma.<sup>69</sup> Often,

62. 880 F.3d 1122 (9th Cir. 2018).

63. 424 U.S. 319 (1976).

64. 564 U.S. 431 (2011).

65. This Note will not discuss the argument *C.J.L.G.* makes for *Turner v. Rogers*, 564 U.S. 431 (2011).

66. *Mathews*, 424 U.S. at 319.

67. *Id.*

68. *Id.*

69. Lindsay Harris, *Contemporary Family Detention and Legal Advocacy*, 136 HARV. LATINX L. REV. 21, 146-47 (2018) (discussing the Obama Administration's response to asylum-

IIC have traveled thousands of miles by foot or by train to reach safety. Additionally, many children have traveled without parents or were likely separated from their parents at the United States-Mexico border, imparting further trauma. However, it is crucial to recognize that the child's primary interest in this case is survival, and the gravity of the IIC's situation warrants weighing this factor more heavily than those in the other two prongs of the *Mathews* test.

Second, the risk of depriving a child of legal counsel at the government's expense as an additional safeguard, is a secondary concern. In *Franco-Gonzalez v. Holder*,<sup>70</sup> the United States District Court of the Central District of California recognized that the government is required to provide legal counsel to immigrants with mental disabilities. *Franco-Gonzalez* warranted interpretation of the Americans with Disabilities Act ("ADA"),<sup>71</sup> the civil rights law that prohibits discrimination against individuals with disabilities and ensures equal treatment for individuals with disabilities. However, *Franco-Gonzalez* did not establish the threshold, if any, for when a child is to be provided with legal counsel. Here, there is no statutory protection for IIC, like the ADA for individuals with disabilities. Further, without legal counsel, the risk of erroneously depriving a child the ability to *competently navigate* the immigration court system is extremely high given that children are incapable of representing themselves in a court of law without a lawyer, regardless of their legal status. Given that many of the children do not speak or understand English used in American courts, the risk of IIC misunderstanding the removal proceedings is also extremely high. These circumstances are analogous to those of the plaintiff in *Franco-Gonzalez* because that district court required legal counsel for immigrants with mental disabilities due to incompetency.<sup>72</sup> Incompetence is not solely limited to mental disabilities and, in fact, includes age and ability, which are pertinent factors in proceedings for IIC.<sup>73</sup> Thus, court-appointed counsel at

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seeking families in 2014 by implementing a public awareness campaign, largely televised and advertised in the Northern Triangle, emphasizing the dangers of the journey to the United States). The Author posits that if the child's country of origin is in the Northern Triangle, proof of residence or birth in one of those countries should serve as sufficient evidence to convince the courts the child has experienced high-level trauma in their home country, *and* during their treacherous journeys north.

70. *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010) (holding that U.S. Immigration and Customs Enforcement ("ICE"), the U.S. Attorney General, and the Executive Office for Immigration Review ("EOIR") are required to provide legal representation to immigrant detainees with mental disabilities who are unable to represent themselves in California, Arizona, and Washington).

71. 42 U.S.C. § 12101 (2008).

72. 767 F. Supp. 2d at 1034.

73. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/incompetence> (last visited Sept. 19, 2019) (defining incompetence as, "Lack of legal ability to do something, especially to testify

the government's expense would allow for efficient proceedings that implicate due process protections. For these reasons, this prong is weighed secondarily in the balancing test.

Third, the government's interest in efficiently screening children to determine whether they qualify for asylum, which is also a factor considered by courts, balances in favor of affording IIC with court-appointed counsel at the government's expense. Professor Lindsay Harris describes detention centers in Artesia, New Mexico as "deportation mills."<sup>74</sup> Harris provides that asylum seekers with legal representation in immigration proceedings had lower rates of deportation removals.<sup>75</sup> Legal representation directly impacts the Immigration Judge's ("IJ") ability to efficiently process an asylum case because attorneys are meticulously trained to communicate relevant and applicable facts to the law in question. Failing to provide court-appointed counsel to IIC directly threatens the government's efficiency interest because it hinders the IJ from making a speedy decision and, thus, will increase the number of cases on the already backlogged court docket. Most importantly, the lack of efficiency and accuracy that results from failing to appoint counsel to an IIC, threatens the deeply rooted government interest in providing "liberty and justice for all."<sup>76</sup>

Opponents may argue that the government's interest is to avoid litigation entirely. Furthermore, opponents may argue that providing court-appointed counsel at the government's expense would additionally burden the American taxpayer. However, this concern can be circumvented. It is in the interest of the government and American taxpayers—documented or undocumented<sup>77</sup>—to efficiently manage crises, including the crisis of children representing themselves in federal courts. To rule that children can represent themselves in court is simply bad precedent for all Americans

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or stand trial. May be caused by various types of disqualification, *inability*, or *unfitness*. Someone who is judged incompetent by means of a formal hearing may have a guardian appointed by the court. Sometimes the sole disqualification is age . . .").

74. Harris, *supra* note 69.

75. Harris, *supra* note 69 (explaining that the rates fell by eighty-percent within one month and ninety-seven percent within two months).

76. 4 U.S.C. § 4 (1954).

77. INTERNAL REVENUE SERVICE, *Individual Taxpayer Identification Number ("ITIN")* (June 19, 2019) (The vast majority of undocumented people pay taxes, regardless of whether they have a Social Security number, via the ITIN process.), <https://www.irs.gov/individuals/individual-taxpayer-identification-number>; Hunter Hallman, *How do Undocumented Immigrants Pay Federal Taxes? An Explainer*, BIPARTISAN POL'Y CENTER (Mar. 28, 2018), <https://bipartisanpolicy.org/blog/how-do-undocumented-immigrants-pay-federal-taxes-an-explainer/> ("Most experts believe that the vast majority of tax returns filed with ITINs today are filed by undocumented immigrants rather than the intended recipient groups—a few categories of noncitizens who do not have a Social Security number and are not authorized to work but who are still earning income and legally residing in the United States.").

regardless of legal status because our courts honor *stare decisis*.<sup>78</sup> American taxpayers can avoid being additionally burdened by the costs of court-appointed counsel at the government's expense because funds already utilized to unsuccessfully deter migration,<sup>79</sup> can be diverted away from the Department of Justice, Customs and Border Patrol, and even the military to provide court-appointed counsel to IIC.

Based on the aforementioned, it is in the best interest of IIC facing removal, the government, *and* the American public, to afford legal counsel to IIC because doing so: (1) satisfies the procedural due process protections proscribed by the United States Constitution, (2) safeguards the rights for all people in the United States, and (3) utilizes United States tax dollars in a manner that has been empirically proven to promote justice and judicial efficiency.<sup>80</sup>

### C. Treatment of Children in Judicial Proceedings

Even if an IIC's due process rights are not recognized, the treatment of children in judicial proceedings warrants affording court-appointed counsel at the government's expense. It is long-established law that children facing delinquency charges, shall be afforded the same constitutional protections as adults.<sup>81</sup> Additionally, in California and throughout parts of the nation, children are provided attorneys when they face dependency charges<sup>82</sup> because they are under the supervision of the court.<sup>83</sup> Given this jurisprudence and the nature of crimmigration, it defies logic to force children to navigate legal proceedings without court-appointed counsel.

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78. *Stare decisis* is a legal doctrine that binds courts to follow precedent when making a ruling on a similar case and ensures that cases with similar facts are approached in the same way for judicial consistency.

79. Gomez, *supra* note 44.

80. Harris, *supra* note 69 (discussing that removal cases with legal counsel have had up to a 90% decrease in removal, and have increased judicial efficiency).

81. *Gault*, 387 U.S. at 1.

82. Juvenile dependency charges, unlike juvenile delinquent charges, but similar to IIC removals, are not criminal in nature but can result in the separation of a child from their parent or guardian.

83. JUDICIAL COUNCIL OF CALIFORNIA, CENTER FOR FAMILIES, CHILDREN, AND THE COURTS, *The Juvenile Dependency Court and You: A Guide For Parents* (2014), <https://www.courts.ca.gov/documents/juvenile-dependency-court-and-you.pdf> (outlining the dependency process and the rights of children and parents to have an attorney appointed to their cases); *see also* NATIONAL CENTER FOR STATE COURTS, *Every Kid Deserves a Family: Safely Reducing Reliance on Group Home Placements for Children in the Child Welfare System* (2017), <https://www.ncsc.org/everykid> (a judicial toolkit to assist judges, attorneys, and advocates regarding the placement of children to ensure least restrictive and most family-like placement for each child under court jurisdiction).

Further, the argument that civil proceedings do not warrant additional safeguards—unlike the right to legal counsel in *criminal proceedings*—is weakened by the fact that both children and parents are afforded legal counsel in some juvenile dependency proceedings in the civil context, as previously mentioned. Therefore, the treatment of children in immigration proceedings is inconsistent with the general judicial treatment of children for no legitimate reason, and should be altered in the interest of justice.

#### **D. Why Refugee Children Are in Danger Without Due Process**

Denying refugee children Fifth Amendment protections will have significant consequences, including: (1) placing children in detention while the proceedings move slowly through a heavily backlogged immigration system—which can result in voluntary deportation, or (2) expedited removal.<sup>84</sup> When children do not have legal representation, both outcomes, temporary detention<sup>85</sup> and expedited removal,<sup>86</sup> raise constitutional concerns. Because IIC face unconscionable danger if they are not afforded due process, the constitutional protection from cruel and unusual punishment must be addressed.<sup>87</sup>

### **IV. Depriving Refugee Children Protection from Death Is Cruel and Unusual Punishment**

The Eighth Amendment of the United States Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>88</sup> Thus, denying children who are fleeing violence and death threats<sup>89</sup> the opportunity to a legal process subject to constitutional protections will likely result in their removal and death or, at minimum, indefinite detention in deplorable and unconstitutional conditions.<sup>90</sup> Moreover, both outcomes violate IIC’s constitutional rights because the confinement is comparable to that of a JLWOP sentence and indefinite solitary confinement, both which constitute cruel and unusual punishment.

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84. *Supra* Part III, § (a)(II).

85. César Cuatémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014).

86. David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT’L L. 672 (2000).

87. U.S. CONST. amend. VIII.

88. U.S. CONST. amend. VIII.

89. BBC NEWS, *supra* note 17.

90. *Flores v. Sessions*, 862 F.3d 863, 872 (9th Cir. 2017) (affirming the conditions outlined in the *Flores Settlement* that “set a nationwide policy for the detention, release and treatment of minors detained”).



### A. The United States Supreme Court Ruled That it is Unconstitutional to Sentence Juveniles to Indefinite Detention<sup>91</sup>

In *Miller v. Alabama*, the Supreme Court held that JLWOP sentences for children “pos[e] too great a risk of disproportionate punishment.”<sup>92</sup> There, the Court recognized that a judge may encounter a rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified—but in light of “children’s diminished culpability and heightened capacity for change,” the *Miller* Court made clear that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be *uncommon*.”<sup>93</sup>

Here, the only difference between an IIC and a juvenile delinquent is that an IIC’s removal is deemed a civil procedure and the latter, a criminal one. However, given the realities of the crimmigration system, these differences are nominal. IIC proceedings are analogous to juvenile delinquent proceedings because both involve court supervision of non-criminally charged children. The only notable difference between the two groups of children is their citizenship status. But given the high stakes in removal proceedings, IIC being deported back to the very countries they are fleeing for survival, the difference in legal status is minimal compared to the humanitarian considerations in how courts treat children. This difference is minimal because despite the immigration proceedings “civil” classification and the system’s “detention” classification, these children are imprisoned in worse-than-prison-like-environments or deported to a country where they are extremely likely to be killed.<sup>94</sup> More importantly, removal and death sentences are, in essence, one in the same, which warrants additional safeguards provided *at the government’s expense*.

Without legal counsel and a lack of judicial efficiency, an IIC is likely to be detained indefinitely,<sup>95</sup> with the court’s label of “temporary detention.” Indefinite detention is equivalent to JLWOP and the Cruel and Unusual conditions of *hieleras*,<sup>96</sup> in which children are detained, represents another unconstitutional aspect of this process. In *Jennings v. Rodriguez*,<sup>97</sup> the Court

91. The Author equates a “life without parole” sentence to an “indefinite detention.”

92. *Montgomery v. La.*, 136 S. Ct. 718 (2016); *Miller v. Ala.* 567 U.S. 480\_\_ (2016)

93. *Id.* at 733-34 and 2469, respectively (emphasis added).

94. *Arce & Weissenstein*, *supra* note 26.

95. Domenico Montanaro, Richard Gonzales & Nina Totenberg, *Supreme Court Ruling Means Immigrants Could Continue to Be Detained Indefinitely*, NPR (Feb. 27, 2018, 7:42 AM), <https://www.npr.org/2018/02/27/589096901/supreme-court-ruling-means-immigrants-can-continue-to-be-detained-indefinitely>.

96. See *infra* Part III, § (b) Conditions in *Hieleras* and Current Detention Practices Constitute Cruel and Unusual Punishment; *Hieleras* [Icebox] (commonly used to describe the extremely cold temperature in detention centers).

97. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

held that detained immigrants do not have a statutory right to periodic bond hearings, meaning indefinite detention is the law of the land.<sup>98</sup> The *Jennings* case further perpetuates the crisis occurring in United States federal courts because, in addition to depriving IIC of court-appointed counsel at the government's expense, indefinite detention creates another obstacle preventing IIC from receiving a fair opportunity to navigating complex immigration proceedings. Moreover, in ruling that indefinite detention is the law of the land, the Majority overlooked the Dissent's attempt<sup>99</sup> to analyze the conditions in which children are detained, resulting in a faulty ruling.<sup>100</sup>

### **B. Conditions in *Hieleras* and Current Detention Practices Constitute Cruel and Unusual Punishment**

*Hieleras*, the Spanish word for "ice box," is the term migrants, immigration activists, and even federal government officials use to refer to the cramped holding cells used by CBP to detain migrant adults and children.<sup>101</sup> While in detention, migrant women and children are held in small, crowded rooms, use thin, foil blankets to keep warm in extremely low temperatures, and are denied access to essentials, such as mattresses and medicine.<sup>102</sup> Conditions in *hieleras* are so dangerous that, in 2013, lawsuits filed against the United States government referenced a woman whose lips who chapped and split, and other women and children whose lips and fingers turned blue from hypothermia.<sup>103</sup> The very hardship that children and parents migrate to avoid, suffering and death, are what they endure once they reach American soil, in the *hieleras*.

In August 2018, an eighteen-month-old migrant child, Mariee, developed an unknown infection and respiratory problems that became viral pneumonitis, which ultimately led to her death.<sup>104</sup> The detention center

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98. Ahilan Arulanantham & Michael Tan, *Is it Constitutional to Lock up Immigrants Indefinitely?*, ACLU (Mar. 5, 2018, 10:00 AM), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/it-constitutional-lock-immigrants>.

99. *Jennings v. Rodriguez*, 583 U.S. \_\_ (2018). (Breyer, S., Ginsburg, R., Sotomayor, S., dissenting) ("the circumstances of their detention are similar, so far as we can tell, to those in many prisons and jails. And in some cases, *the conditions of their confinement are inappropriately poor.*") (emphasis added).

100. The Author posits that the Ninth Circuit had the opportunity to address this faulty ruling in the CJ case by ruling that it is constitutional to appoint legal counsel to an IIC at the government's expense.

101. Opheli Garcia Lawler, *The Iceboxes at the Border*, THE CUT (Dec. 26, 2018), <https://www.thecut.com/2018/12/what-are-las-hieleras-iceboxes-used-by-cbp-at-the-border.html>.

102. Lawler, *supra* note 101.

103. *Id.*

104. Emma Platoff, *Report: Toddler Died After Contracting Infection at ICE Family Detention Facility*, TEX. TRIBUNE, (Aug. 27, 2018, 6:00 PM), <https://www.texastribune.org/2018/08/27/toddler-died-ICE-custody-vice-news-dilley/>.

conditions have only worsened. On December 25, 2018, there were multiple reports of children that died while in the custody of Border Patrol agents.<sup>105</sup> The United States combats migrants' fear of death, with death. These conditions, which result in the torture and death of children, unequivocally equate to cruel and unusual punishment.

The *mere possibility* of IIC being detained indefinitely is also a violation of the Eighth Amendment. In 2015, the State of California settled a landmark case that ended indeterminate solitary confinement<sup>106</sup> in California prisons.<sup>107</sup> In *Ashker*, the district court held that: (1) prolonged solitary confinement violates the Eighth Amendment's prohibition against cruel and unusual punishment, and (2) the absence of meaningful review for placement in the Secured Housing Unit ("SHU") violates the prisoners' rights to due process.<sup>108</sup> Here, the reality of IICs is analogous to the practice of solitary confinement because IIC face the possibility of *indefinite detention*. Whether IIC are indefinitely detained with or without their families, they are inherently *punished* for seeking refuge and survival. Courts have recognized the *unconstitutional practice* of punishing inmates within the *criminal* justice system to this extent and, thus, it is impracticable to reformulate these practices for children and families seeking refuge who are undergoing *civil* removal proceedings. The opportunity for IIC to be indefinitely detained, undoubtedly inhibits cruel and unusual *punishment*, and needs to be eradicated immediately from the *civil* removal proceedings.

Last, the *government's ability* to indefinitely detain IIC is parallel to the imposition of a JLWOP sentence. The cruel and unusual punishment that *Miller*<sup>109</sup> directly attempts to mitigate is wholly present in the confinement conditions for migrant children because IIC face the possibility of never being released. Therefore, this practice, and turning a blind eye to any viable remedy for IIC and their families, is entirely unconstitutional. It amounts to

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105. NAT'L IMMIGR. LAW CENTER, *Unconstitutional Conditions in Border Patrol Facilities* (Aug. 17, 2016), <https://www.nilc.org/issues/immigration-enforcement/hieleras/>; Miriam Jordan, *8-Year Old Migrant Child From Guatemala Dies in U.S. Custody*, N.Y. TIMES (Dec. 25, 2018), <https://www.nytimes.com/2018/12/25/us/guatemalan-boy-dies-border-patrol.html>; Alan Gomez, *8-Year Old Guatemalan Girl in Border Patrol Custody Dies From High Fever, Seizures; Feds Fault Father*, USA TODAY (Dec. 14, 2018, 6:37 AM), <https://www.usatoday.com/story/news/world/2018/12/14/migrant-child-death-guatemalan-girl-minor-trump-administration-immigration-border-patrol/2309596002/>; Platoff, *supra* note 104; Liam Stack, *Mother Whose Child Died After ICE Detention Sues for \$60 Million*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/us/migrant-child-wrongful-death-lawsuit.html>.

106. Solitary confinement is a practice to isolate inmates as a form of punishment while they are serving their sentences.

107. *Ashker v. Brown*, Case No. 4:09-cv-05796-CW (N.D. Cal. Dec. 21, 2017).

108. *Id.*

109. 567 U.S. 480 \_\_\_\_ (2016)

cruel and unusual punishment and, in the interests of justice and humanity, courts should abolish it.

## V. Conclusion

As demonstrated, the immigration crisis in the United States is not at the southern border; it takes place in federal immigration courtrooms.<sup>110</sup> It is of the utmost importance that indigent immigrant children are afforded the right to court-appointed counsel at the government's expense. We must ensure that our judicial system is consistent with the constitutional rights afforded to all children on American soil. The Ninth Circuit dodged key legal issues that might be raised on *writ* to the Supreme Court: whether an undocumented child's right-to-counsel is embedded in the United States Constitution's Due Process Clause; and, whether a failure to enforce that right results in outright cruel and unusual punishment as enumerated in the Eighth Amendment. The answers, to both, are simple: Yes, and yes.

Since the Ninth Circuit avoided answering the question of whether IIC are afforded the right to court-appointed counsel, congressional or executive action must address the immigration crisis. Campaigns for the 2020 presidential election are in full swing and, although there have been congressional visits to some of these detention centers,<sup>111</sup> there is minimal indication that any current presidential contenders have the *real immigration crisis* on their radar. The rate of deportation removals decreases when litigants are afforded the right to counsel, which plainly demonstrates that legal representation matters. Legal representation for IIC is imperative in order to save their lives. Given the harsh conditions in the countries that they migrate from, and the similarly life-threatening conditions they endure while detained in the United States, children cannot be expected to fend for themselves in a courtroom. Thus, forcing children to represent themselves in immigration proceedings is unconstitutional and inhumane.

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110. This is not intended to minimize the unconstitutional conditions of the *hieleras*. The Author merely aims to convey that the lack of access to legal representation constitutes a crisis.

111. Catherine Kim, "People drinking out of toilets": AOC and Other Democrats Share Details from Their Texas Border Facility Tour, VOX (July 2, 2019), <https://www.vox.com/2019/7/2/20678806/aoc-democrat-texas-border-facility-tour>.

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